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ABSTRACT

Despite a tradition of government secrecy, Canada recently adopted freedom of information legislation. Reflecting greater public and media interest in the issue of public access to information and government secrecy, Bill C-34, the Access to Information Act, received royal assent in 1982, as did a privacy act, enacted to protect the complementary right to individual privacy. The major issues covered in the Access to Information legislation include the question of who has access to government information, procedures for obtaining the information, the appeal process, and exemptions. While the Act has a number of positive features--it establishes a two-tiered review of the legislation and, by its very existence, encourages greater openness in government--it also has serious weaknesses. The fee for viewing government documents, for example, discrimimates against the individual citizen, and critics have suggested that the many exemptions in some ways fortify secrecy rather than limit it. It is apparent, comparing Bill C-34 as introduced with the Act as passed, that more limitations were imposed, resulting in a more restrictive statute. The limitations strongly suggest that individuals in Canada have access only to information the government wants them to have. (HTH)

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International Communication Division

FREEDOM OF INFORMATION IN A PARLIAMENTARY GOVERNMENT: CANADA'S NEW ACCESS TO INFORMATION LEGISLATION

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> Democratic progress requires the ready availability of true and complete information. In this way, people can objectively evaluate the government's policies. To act otherwise is to give way to despotic secrecy. -- Pierre Elliott Trudeau[1]

> Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": insofar as it can, it hides its knowledge and action from criticism....The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. -- Max Weber[2]

In many western democracies, the attempt to balance the need for administrative secrecy for the effective functioning of government and the need for public access to information to assure a more effective participation in the political process has always been a difficult, if not uneasy, task.

For many of these countries, with the exception of Sweden, government secrecy was the rule rather than the exception. Sweden's experience with the principle of a right of public access to information extends over two centuries, with the constitutional recognition of this right dating back to 1766.[3] Scholars of administrative secrecy are unanimous in calling Sweden the most open of western democracies.[4]

More recently, however, a trend has been developing toward more governmental openness with an increasing number of countries adopting Freedom of Information legislation. The countries that have done this include Finland (in 1951), Denmark and Norway (in 1970), the United States (in 1966), France and the Netherlands (1978),[5] and most recently, Australia in 1982

and Canada in July of the same year.[6]

Two Canadian provinces have already adopted Freedom of Information legislation: Nova Scotia in 1977 and New Brunswick in 1980. In that same year, the Ontario government completed its three-year study on the issue with its three-volume report titled Public Government for Private People with the intent of coming up with similar legislation.

As a case study of the attempt to balance the needs for administrative secrecy and public access to information, this paper will analyze Canada's new Freedom of Information legislation by looking at the environment within which it was conceived, its evolution, and finally, the contents of the legislation itself as it fulfills this balancing process.

Why Freedom of Information?

The issue of freedom of information arises out of the definition of the relationship between the rulers and the governed -- 'government and the people', as it were -- within the context of a democracy. Whether the framework is parliamentary or republican, certain assumptions hold: first, there is an assumption that those who are chosen to govern are "fit" to do so and second, there is the corollary assumption that they serve at the pleasure of the governed.

The implications for the flow of information are obvious. To govern well, those in power must have some degree of control over this flow. On the other hand, the ability to hold the government to account also requires information about government's activities. For a long time, the information scale appeared to be weighted in favor of those who governed. More recently, the adoption of freedom of information legislation by an increasing number of western democracies may suggest a more active citizenry, greater dis-

satisfaction with traditional means of accountability (political parties, the courts, the mass media, the ballot), and perhaps even an attempt on the part of government to regain some of the legitimacy and confidence many governments seem to have lost.

In the case of parliamentary governments, the attempt to adopt freedom of information legislation is not particularly easy, given the greater concentrations of power and hierarchical structure of government. In the case of Canada, it was a process that took almost twenty years.

The Tradition of Government Secrecy in Canada

The Canadian tradition of administrative secrecy can be traced to the British, although as the acknowledged expert on the subject of administrative secrecy has observed, "Canadians have always been vaguely unhappy about copying the British practice...and have never been quite as barefaced in its application as the British."[7]

Doern summarizes this tradition rather well:

> Governmental secrecy in Canada is based largely on British parliamentary practice: the common-law doctrine of crown privilege, the traditions of ministerial responsibility and of an anonymous civil service, the principle of freedom of the press, the Canadian version of the Official Secrets Act, and a system of classification for government documents. The prevailing view among scholars is that Canadian public bureaucracies are excessively secretive and that Canada's official information policies reflect traditional concepts and a slavish adherence to bureaucratic secrecy.
>
> Common-law traditions of crown privilege recognize the right of the Crown to refuse to disclose classified information where it is felt that disclosure would be detrimental to the public interest. The concepts of ministerial responsibility and civil service anonymity have, in part, contributed to the general assumption that all documents are secret unless they are specifically declared to be public. These concepts also mean that opposition politicians are less able to question or criticize public servants than in other systems of government.[8]

More specifically, the doctrine of Crown privilege stemmed from the

assumption that disclosure of information might endanger national security or prejudice the conduct of diplomatic relations and could harm the efficiency of the public service.[9]

The theory of individual ministerial responsibility underlining parliamentary government suggests that the cabinet is collectively responsible to the legislature and through the latter to the public at large for government policies. The hierarchy of authority and responsibility is such that by law, ministers are ultimately responsible for actions taken in their respective departments. This system has two presumptions regarding the flow of and control over information: first, in order to facilitate frankness of debate and expression of opinion, discussions between ministers and civil servants need the assurance of confidentiality; it is also this assurance that helps preserve the conventions of civil service neutrality and anonymity.[10] Second, ministerial responsibility as the ultimate level of accountability means ministers have the final word about which documents can be released and which should remain confidential.

To support this system of accountability, the civil servant in Canada takes an oath that he "will not, without due authority..., disclose or make known any matter that comes to (his) knowledge by reason of such employment."[11]

In addition to these parliamentary traditions, both the Official Secrets Act[12] and the classification system for national security[13] also promoted government secrecy. The Official Secrets Act was adapted from the British Act of the same name and was drafted in the atmosphere of tension and suspicion of the second world war. It was not surprising that its provisions were sweeping and authoritarian. What is surprising is that the Act remains today, is essentially unchanged, and has, in fact, been applied as recently as 1979.[14] While no one quarrelled with its intent of protecting

national security, its provisions of broad police powers, its 'unusual' rules for evidence and procedure in espionage cases, its placement of the burden of proof on the accused, have all been sharply criticized,[15] even by government commissions.[16] Similarly, the security classification system used in Canada has been criticized for overclassifying and using definitions that were "excessively broad."[17] Unlike the American classification system which uses the standard of "damage to national security", the Canadian system uses the criterion of "damage to the nation" in determining how documents are to be classified, a much broader standard.[18] Not surprisingly, both the Official Secrets Act and the security classification system have only served to perpetuate the lack of openness in government.

There are also political factors which help to explain the tradition of administrative secrecy in Canada. One is the characteristic of single-party dominance, a situation where "one political party retains such overwhelming strength over a period of at least a decade that the major political issues of the community are fought out and the major conflicts of interest resolved within that party."[19] In the 108 years since confederation, Canada has had four major political leaders hold power for over 60 of those years, the last being the current Prime Minister Pierre Trudeau, with his Liberal Party in power since 1968 except for a brief interruption by the short-lived Progressive Conservative government under Joe Clark in 1979.

Single-party dominance is characterized by a strong leader who becomes the focus of party members' loyalty. In the context of a legislature organized on the basis of party discipline, single-party dominance heightens the significance and influence of the cabinet. Debate between the political parties on the floor of the House is thus of less importance than argument behind closed doors among members of the cabinet and the caucus. The

effect of single-party dominance is that "major issues are resolved mainly in secret, and the fruitfulness of open democratic debate to educate the voter is stultified."[20]

A final factor that may have impeded earlier adoption of freedom of information legislation may be found within Canadian political culture which seems not to discourage government secrecy. While its values are basically democratic in terms of the notions of popular sovereignty, political equality, and majority rule, attempts to compare the political culture of Canadians and Americans suggest that the former is essentially more "conservative," that is:

> Canadian political society has stressed order, loyalty, and deference to government more than popular assent. Rather than "life, liberty, and the pursuit of happiness", the need has been "peace, order, and good government." Social equality is desired, but with less fervor than in America. Hierarchy in all spheres of life is taken for granted.[21]

In his well-known studies on comparative political cultures, Lipset has tried to document other differences between Canadians and Americans in terms of their orientations toward education, the law, achievement and self-orientation, all of which contribute, according to Lipset, to Canadian political values tending more toward ascriptive and elitist patterns.[22] The confluence of these various characteristics is a tendency toward greater elite accommodation in Canada, where major policy decisions are worked out between government and interest group elites.[23] There is thus a greater tendency on the part of the average citizen to accept government's prerogative to disseminate or withhold information as it sees fit.

The Evolution of Freedom of Information legislation

It is significant that the early bills on freedom of information in

Canada were submitted by members of the opposition parties, spurred in part, no doubt, by their frustrations with the lack of access to government information. As early as 1965, Barry Mather, New Democratic Party MP, introduced a private member's bill calling for consideration of freedom of information. The fight for legislation in this area was carried on for close to twenty years by Gerald Baldwin of the Progressive Conservative Party. Although their attempts were not successful on the parliamentary level, they at least kindled public interest in a more open government and were instrumental in stimulating public debate.[24]

In 1969, the Report of the Task Force on Government Information recognized that Canadians have a right to "full, objective and timely information on government activities."[25] One of the Task Force's primary recommendations was that Information Canada (then the Canadian government's domestic centralized information agency, now dismantled) be utilized as an ombudsman for the public's right to know. Although this recommendation was rejected by the Trudeau government,[26] it was at least the first government recognition of the importance of creating some governmental mechanism to facilitate public access to information.

Four years later, the Trudeau government commissioned another review on government information, this time in response to a series of 'leaks' of government documents. Subsequently known as the Wall Report[27] for its author, D.F. Wall, then assistant secretary of the cabinet for security matters, the Report concluded that there was no need at that time for specific legislation similar to the U.S. Freedom of Information Act and made note of some of the problems resulting from passage of this legislation across the border. The Report concentrated on the criticism of the elaborate

bureaucratic structure involved in maintaining the U.S. legislation and its adherence to the letter but not the spirit of the law.[28] Wall suggested an approach based on reform rather than on new legislation, concentrating on sharperning the definitions of national security categories and refining classification procedures. The impact of this Report was minimal, in part because ironically, it was not made public until a year later.[29]

In 1977, the government came out with a Green Paper entitled Legislation on Public Access to Government Documents. In its discussion on possible Freedom of Information legislation, the Green Paper was obviously opting for a weak law. It raised the spectre of the impediment to effective functioning of government by interfering with the provision of frank and complete advice in decision-making which would result from disclosure. It again emphasized adherence to the principle of ministerial responsibility and contended that any judicial review of a Minister's discretionary power to release information would violate this principle. Finally, it argued that the costs of erecting such an administrative system for disclosure would be enormously high. With its list of exemptions so broadly worded and its opposition to judicial review, it was not surprising the Green Paper's proposals were received with little enthusiasm.

In October of the following year, the Speech from the Throne promised Freedom of Information legislation during that session. With this development, the Canadian Bar Association which all along had been an active lobbyist in favor of legislation in this area presented its model bill.[30] However, the Liberal government was defeated in 1979 with no legislation considered on the issue. The new minority Conservative government of Joe Clark introduced its own Freedom of Information legislation to fulfill a campaign

promise but also to bring about legislation in an area in which they had consistently advocated reforms in their long period as opposition party.[31] The bill did not see passage with the defeat of Clark's government in December of the same year.

When the Trudeau government was returned to power in 1980, agitation for Freedom of Information legislation had now become more pronounced and it was at this point that Bill C-43 was presented in the House and debated on for two years. It finally received royal assent on July 7, 1982. At the same time, a Privacy Act was enacted that would protect the complementary right to individual privacy.[32]

There were, of course, other factors that promoted passage of the legislation in addition to parliamentary pressure and government initiative. A number of events also triggered greater public and media interest in the issue of public access to information and government secrecy. In the first instance, a civil servant Walter Rudnicki successfully sued Central Mortgage and Housing, a Crown corporation, for wrongful dismissal. He had been fired because he had shown a draft memorandum for the Cabinet regarding native housing policy to concerned native groups. Despite the fact that he had been instructed to consult with the groups before the memorandum went to Cabinet, the Minister, infuriated with the supposed 'leak', ordered him fired.[33]

In another 'cause celebre', Peter Worthington, publisher of the Toronto Sun, was prosecuted by the Crown because his newspaper had published a story describing Soviet espionage activities in Canada. Although the report had been based on a government document marked 'secret', some of the information had already been broadcast and had also been presented in the House of Commons. Given the prior public discussion and the fact the document did not

appear to merit the 'secret' stamp, the court dismissed the charges.[34]

The third case involved an engineer, Peter Treu, working for a private firm but who had previously done some government consulting work. Treu's home was raided by the RCMP (the Royal Canadian Mounted Police) in 1974 and numerous documents were seized. Treu was charged with violating the Official Secrets Act by retaining NATO documents even after his security clearance had been cancelled. Treu was sentenced to two years in prison although his conviction was reversed on appeal. The most troubling aspect about the Treu case for the media and the public was the entire four-year trial had been conducted in secret. The Toronto Globe and Mail. which had given extensive coverage to the case, was moved to attack the Official Secrets Act as "a travesty that slithers on, unbloodied and unbowed."[35]

In addition to these cases, there were also the much publicized charges of wrong-doing by the once venerable symbol of law and order, the RCMP. Allegations, subsequently corroborated by government commissions inquiring into its activities, included widespread use of bugging and wiretaps, sometimes unwarranted and abusive search and seizure tactics and the frequent use of confidential medical records to disrupt groups considered to be 'politically extreme.'[36] Such revelations only served to further shake the comfortable confidence of Canadians that they could safely entrust the affairs of government in general to government.[37]

Pressure from various interest groups[38] and increasing public interest in the issue of consumerism also helped to prod the government to adopt access legislation,[39] especially with greater public concern for product testing, safety, labeling, and environmental safety.

A case that illustrated the ridiculous lengths to which secrecy could be applied was the Yukon milkshake case where it was discovered that milk-

shakes being served in some restaurants in the Yukon did not measure up to federal health standards. Marc Lalonde, then Minister of Health, refused to release details on the ground that disclosure of the information "would interfere with the working rapport" between federal health inspectors and restaurant owners."[40]

The adoption by the United States of freedom of information legislation also helped along the Canadian case. It was not unusual during the House debates on access legislation for cases to be cited where Canadians had to travel to the U.S. to obtain information about Canada -- using the American Freedom of Information Act. A case in point was cited by one of the Conservative MPs where the Canadian government had been reviewing tests concerning the carcinogenic qualities of a certain fungicide. The information was kept secret in Canada but was shared with the U.S. government and the legislator had to use Freedom of Information legislation in the U.S. (whose use is not limited to U.S. residents or citizens) to get these Canadian documents. The documents revealed that the fungicide was unsafe, yet remained on the shelves, and the product's manufacturer, Chevron, had asked the testing company to change the data because it showed mutational effects on animals.[41]

Finally, the principles of ministerial responsibility and the anonymous civil service were increasingly being questioned. It has been argued that the scope and complexity of government activity has weakened the process of accountability inherent in individual ministerial responsibility and that civil servants more and more are called to appear in public before parliamentary committees to justify or explain policy.[42] Moreover, "the orderly chain of command and responsibility implied in the constitutional orthodoxy has been further eroded by the growing use by governments of consultants

and of contracting out for services."[43]

All of these factors in sum helped create the push for more openness in government, culminating in the legislation which interestingly enough the government preferred to call "Access to Information," rather than "Freedom of Information."

Major Provisions of the Legislation

The major elements of the Access to Information legislation that will be discussed include who has access to government information, the procedures for obtaining the information, the appeal process, and the exemptions. All of these elements have important implications for whether in fact the principle of access is effectively promoted. While the legislation has been in place for over a year, it has taken the government almost the entire period to install the mechanisms required for the legislation to operate and use of its provisions does not officially begin until July 1 of this year. The Information Commissioner, charged with overseeing the legislation's apparatus and operation, has only been recently appointed[44] so analysis precludes any observations about use of the legislation.

The preamble to the Act says its purpose is

> to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

The Act specifies that every person who is a Canadian citizen or permanent resident has a right of access. The Governor in Council, on request, may also extend the right to persons outside this category.[45]

To facilitate the request for access, the Act provides that all government ministers publish at least once a year a description of the organization, its responsibilities, the classes of records under its control, and all manuals used by its employees, and the title and address of the appropriate officer to whom the access request is to be made. Twice a year, a bulletin updating this publication would be disseminated.

Procedure. The Act provides that a request for access be made in writing and that the department in question respond within 30 days with the provision for access if this has been granted, or if denied, with the reasons for denial.[47]

It specifies a maximum fee of $25 at the time the request is made and any subsequent costs for reproduction. In addition, payment may be required "for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given."[48]

The Information Commissioner, appointed for a term of seven years by the Governor in Council after approval by Parliament, is the first level of appeal in cases where applicants decide to contest either a denial or the procedures imposed. In turn, the applicant who chooses to appeal the Information Commissioner's decision may do so before the federal courts.[49]

Exemptions. Because of the length of the exemptions, they will be summarized here, with careful attention given to whether the language used is mandatory ("shall refuse disclosure") or permissive ("may refuse disclosure"), whether the criterion used is the subject matter or class of documents, clearly a broader restriction ("all documents pertaining to national security"), or an injury test ("whether disclosure can be reason-

ably expected to be injurious to the conduct of international affairs"), and time limits imposed where appropriate. For reference convenience, the numbers in brackets refer to the appropriate subsection number in the Act.

Disclosure of records by the head of a government institution

1. (13) shall be refused for those obtained in confidence from foreign governments, international organizations, provincial or municipal governments, unless the government in question has consented to the disclosure or has consented to make the information public.

2. (14) may be refused if disclosure could "reasonably be expected to be injurious to the conduct by the government of Canada of federal-provincial affairs," including consultations, deliberations, strategies or tactics relating to this area.

3, (15) may be refused if disclosure could reasonably be expected to injure the conduct of international affairs, the defense of Canada or its allies, or the detection, prevention, suppression of subversive activities, including information on defense equipment, intelligence-gathering, or negotiating positions.

4. (16.1, 2) may be refused for information obtained in the course of law enforcement for federal or provincial governments if the records have been in existence less than 20 years or if the information could be injurious to law enforcement.

5. (16.3) shall be refused if obtained and prepared by the RCMP while performing policing services for a province or municipality where the federal government has agreed not to disclose the information on the request of the province or municipality.

6. (17) may be refused where disclosure "could reasonably be expected to threaten the safety of individuals."

7. (18) may be refused for trade secrets, financial, commercial or scientific information belonging to the federal government, where disclosure might threaten the government's competitive position,

be injurious to its ability to manage the Canadian economy, including information on currency, tariff rates, sale or purchase of securities, land, or property.

8. (19) shall be refused for information about an identifiable individual (except government employees, or those under contract or receiving discretionary benefits) unless public interest in disclosure clearly outweighs invasion of privacy.

9. (20) shall be refused for trade secrets of a third party, other financial, technical information supplied by a third party in confidence, whose disclosure would hurt a third party's competitive position or would interfere with negotiations with a third party. Results of product or environmental testing done by the government for a third party for a fee should be made public. With the exception of trade secrets, the above category may be disclosed with the consent of the third party "if such disclosure would be in the public interest as it relates to public health, public safety or the protection of the environment" or if the public interest outweighs the third party interests in this section.

10. (21) may be refused if it relates to advice or recommendations, consultations or deliberations for or by a government Minister, plans relating to personnel management or government administration, or positions or plans for negotiations by or on behalf of the government if the records are less than 20 years old.

11. (22) may be refused if it has information on testing or auditing procedures or details of tests or audits if disclosure would prejudice results of tests or audits.

12. (23) may be refused if subject to solicitor-client privilege.

13. (24) shall be refused if the information is restricted under the Privacy Act.

14. (26) may be refused if the official believes on reasonable grounds that the material requested will be published within 90 days after request or within a period required for printing or translating for its publication.

15. (69) shall be refused where they apply to confidences of the Privy Council,* including memoranda on proposals or recommendations, discussion papers, agenda, records of deliberation or decisions, briefing records, draft legislation and "records that contain information about the contents of any record within a class of records referred to in (this section)" unless the records are more than 20 years old, or unless the decisions to which the discussion papers relate have been made public, or, where decisions have not been made public, if four years have passed since the decisions were made.

There is one feature of the Canadian Access legislation that reflects a characteristic unique to Canadian politics: the presence of exemptions in the area of federal-provincial negotiations or deliberations. Canada, like the U.S. and Australia, has a federal form of government. What makes Canadian politics differ from the other two countries where federalism is concerned is that while Australia and the U.S. have veered in practice toward a more unitary state, the balance of power in Canada has swung from one level to the other. Thus, much political discourse tends to be dominated by federal-provincial relations. Given the dominance of the executive branch and the long-term dominance of single parties, there is increasing consensus that provincial governments constitute the effective opposition in Canada.[50] It was consequently not surprising that in the debates over the legislation, provincial governments were not disinterested bystanders; they lobbied heavily -- and successfully, too, as the legislation shows -- for the inclusion of a number of exemptions that affected them.[51] Sections of 1, 2, 4 and 5 may be attributed in part to their efforts. The provinces had, in fact, started with a rather extreme position: they had proposed

*Defined in the Act as including the Privy Council (a civil-service support staff for Cabinet with considerable policy influence), its committees, the Cabinet, and its committees.

that only the government having jurisdiction over a specific area have the authority to make public the documents in that area,[52] a position which the federal government rejected outright.

Analysis of the Legislation

The Access to Information Act has a number of positive features which should be pointed out. First, it acknowledges the realities of today's record-keeping technology by explicitly including computerized information as part of its definition of "records" in subsection 4.3. This was a provision missing in the Conservatives' Bill C-15 and in the Canadian Bar Association's Model Bill.

A second positive feature is the creation of the position of Information Commissioner to oversee the application of the legislation. The other side of the coin is that because the Commissioner relies soley on powers of persuasion, the personality of the person in this position becomes crucial to whether he or she is an effective ombudsman or simply a passive overseer.

The Commissioner is also part of a two-tiered system of review, another positive feature of the Act. If many of the appeals can be resolved on the Commissioner's level, this frees the individual of court costs and frees the court's time for other matters (an advantage absent in the U.S. Freedom of Information review system where the court forms the only means of appeal).

Another advantage is its explicit provision for parliamentary review within three years of its enactment to evaluate the legislation's effectiveness, evidently a unique feature for any statute.[53] There is evidence from the parliamentary debates that some members of the opposition were

moved to vote for passage despite grave reservations about the exemption provisions because of this opportunity for parliamentary review.[54]

The provision that government agency heads provide a comprehensive list of its documents to be updated twice a year certainly eases the access process when an individual can refer to an up-to-date index and probably also enhances the record-keeping procedures of government agencies.

Perhaps the biggest advantage of the Act is its very passage; it is the'psychological factor' created by its very presence. It could very well be argued that the fact the legislation is on the books means it has the potential for encouraging greater openness in government.

Having said this, the fact remains that the ultimate test of a piece of legislation on access to information is whether in fact such access is effectively provided for. Unfortunately, a number of features in the Act bring to question its effectiveness.

The Canadian Act provides the right of access to citizens and permanent residents while the United States and Sweden allow the same right of access to foreigners. In the debates prior to its passage, it was argued that Canada reciprocate this privilege which has proven beneficial to Canadian researchers.[55] While a strong case can be made for limiting this right to those who vote and those who pay taxes, as the Canadian Bar Association pointed out, the utility of this limitation is questionable, given that a foreigner could simply hire a Canadian to obtain the information sought.[56] Unless provisions were provided for its enforcement, this limitation is not very meaningful.

The costs of obtaining access have also been criticized. As the

Globe and Mail editorialized,

> Since the Act would already require an applicant to provide enough information to let an experienced clerk 'identify the record...with reasonable effort,' why should the applicant be penalized for dealing with agencies which don't have an efficient retrieval system?
>
> Any why should he pay for the time the government takes to decide whether or not to release the document? That stipulation would allow an agency to spend hours of time agonizing as to whether a particular page in a document should or should not be released, all at the applicant's expense.[57]

There is no question that the fees imposed can exert a dampening effect for the average citizen who may not have the resources of more organized interest groups, given the fact that the individual could conceivably be paying an exhorbitant fee (the $25 initial fee at the time of request plus the cost of the time required for the search and its preparation) without having obtained the document. The American system stipulates reproduction costs only, costs which may be waived at the government official's discretion.[58] The Canadian Bar's Model Bill called for an initial fee of $15 (to be applied to reproduction costs) and a reasonable search charge, not to exceed $15 in addition to reproduction costs,[59] certainly a more reasonable fee structure than that provided in the Act. The fees charged under the Act are in fact surprising, given the fact that the government in its Green Paper had noted that the charges should "not preclude on economic grounds the participation of a great majority of Canadians."[60]

The key to the effectiveness of any access legislation lies in what it excludes and it is these exemptions which make for the Achilles heel of Canada's legislation.

First of all, there are 15 categories of exemptions (as opposed to 9 in the U.S.), six of which are mandatory with no provision for the appli-

cation of an injury test. These include: documents from foreign governments, provincial or municipal governments obtained in confidence, information obtained by the RCMP for a province where the province has requested confidentiality, personal information, third party trade secrets, information protected by the Privacy Act, and "confidences of the Privy Council", a last-minute inclusion by the government.

The exemptions that protect provincial confidences in general and RCMP investigations for them in particular reflect the political compromises the government felt constrained to make. What started out as a permissive exemption in Bill C-43 as first proposed became in the end a mandatory exemption for a class of documents which at the very least was unnecessary as some claimed,[61] or at most could have been included under Cabinet documents. Not surprisingly, the broad exemption provided for information collected by the RCMP for the provinces was also strongly criticized by legislators and the McDonald Commission for its sweeping nature.[62]

Economic interests are also clearly protected through mandatory exemptions, with control over disclosure in the hands of the third party. While an injury test is provided in this exemption (i.e., if disclosure is in the interest of public health, safety, or environmental protection), disclosure is still done only with third party consent and the injury test does not apply to trade secrets. On the whole, this exemption limits the utility of the injury test appended. While a case can be made for protecting the confidentiality of certain business information, an even stronger case can be made for weighing business interests against the public interest and using a discretionary rather than a mandatory exemption. Much litigation in the United States in this area has been sparked by

public interest groups such as Ralph Nader's organizations and the National Organization for Women (NOW), intent on holding the government accountable in its regulatory practices or its hiring practices.[63]

The most sweeping exemption in the Act is subsection 69 (item number 15), a last-minute amendment introduced by the government and labeled by NDP member Svend Robinson "the Mack Truck clause of the bill."[64] The amendment protects all confidences of the Privy Council and precludes judicial review, a measure adopted in the wake of two provincial court cases where rulings held that in the public interest, certain cabinet confidences could be disclosed in court.[65] In the wake of these rulings, the government obviously got cold feet. It was precisely because of this amendment that members of the New Democratic Party, who had been actively involved in pursuing freedom of information legislation, finally refused to vote for passage.[66] Even Francis Fox, government minister responsible for shepherding the Bill through the House, was said to have been embarrassed by the inclusion of this amendment and its very broadness.[67]

The mandatory nature of these six exemptions also has important implications for judicial review, on which hinges much of the legislation's success. In these cases, and especially since no injury test is applied, the court simply decides whether the government official was authorized to refuse. As one lawyer who lobbied for stronger legislation observed, "The court will merely indulge in an exercise of labeling. If one of the words in the exemption can be applied to the document in question, then the court will simply agree that the Minister was entitled or that he or she had reasonable grounds to refuse. That will be the end of the matter."[68] In an interesting twist, the government uses the court as its stick in its access carrot by explicitly providing that the court can order a minister not to

disclose information if he is authorized to withhold the information. With such a court order, anyone who later violates it can be appropriately penalized for going against a court order.

With all these provisions limiting judicial review, it was not surprising that other members of the opposition (particularly from the Progressive Conservative party) who were quite supportive of the bill as originally enacted gave grudging support to its passage.

The 20-year time span provided by the exemptions for cabinet and Privy Council documents or for law enforcement severely limits the accountability process. The very recognition of a right of access to information is an admission of the importance of informed public participation in discussions of policy or at the very least, informed public evaluation of government performance. In essence, disclosure of documents only if they are at least 20 years old calls these assumptions into question.

Critics of the legislation have also suggested that the Act in some ways fortifies secrecy rather than limits it. Certain exemptions, for instance, protect certain classes of documents which used to be available. These include information from other governments, personal information (it might be argued that this information, useful for social science research whose data is presented only in the aggregate may no longer be available), certain cabinet memos or discussion papers, and third party information.[69]

The restriction in the area of federal-provincial affairs, although permissive, is extremely broad. It is notable that the Conservatives' version of this item used the phrase "federal-provincial negotiations," obviously a more restricted area. As discussed earlier, federal-provincial relations permeates Canadian political discourse and activity to a con-

siderable degree; the problem in fact is that there is hardly any major issue in Canada that has no bearing on federal-provincial affairs. Just in the last two years, for instance, the significant issues of concern to Canadians such as reform and patriation of the constitution, national energy policy, language rights, reform of the Senate and the Supreme Court, financing of medical care, university funding, have all had some relation to and implications for federal-provincial affairs and, in fact, have involved considerable wrangling between the two levels of government. It will be interesting to watch how this particular exemption will be applied.

There are other deficiencies in the Act as well. The 30-day time limit for the government to respond to a request seems unreasonable, especially since government agencies are required to maintain and update their records file. The problem is aggravated by the provision that the agency head may extend the time limit "for a reasonable period of time" where necessary. Because of time constraints on their work, this time limit may effectively preclude journalists from taking advantage of the legislation. Special status for journalists has been advocated elsewhere by greatly reducing the amount of time their initial requests are processed[70] and while we may not be prepared to go this far, it certainly underscores a limitation in the legislation.

The rationale for the provision (10.2) that the government official is not even required to indicate whether a record exists, he simply has to give "the provision on which a refusal could reasonably be expected to be based if the record existed."

There is a long section devoted to "Third Party Intervention" (sec.

28) which includes procedures designed obviously to protect the rights of a third party when access requests are made in connection with their records, procedures involving their appropriate notification, their right to reply, their participation in the review process, and so on. Again, it could be reasonably argued that where measures are taken to protect profit and competition, it would not have been unreasonable to balance this with an injury test such as "where there is a clear public interest that supersedes the private interest."

When first introduced, the Access bill had been criticized because rather than indicating its application to all government institutions, the bill stipulated its applicability to those institutions specifically listed as part of the bill.[71] The problem with this was that there was no way of knowing how comprehensive the list was; furthermore, an amending process would be required to accommodate new agencies or institutions. Most important, the listing was criticized for its non-inclusion of certain crown corporations, especially those which had to do with transportation, communications and energy. When passed, this portion of the bill remained unchanged. While recognizing the importance of protecting the competitive positions of these corporations (which include such visible institutions as the CBC, Petro-Canada, Canada Post, the Canadian Pacific Railway), critics have also pointed out that because they absorb a significant portion of public resources and are important tools of public policy, it is important that they not be excluded from the accountability mechanism afforded by freedom of information legislation, adding that such state-owned or controlled corporations are not excluded in the United States legislation.[72]

It is significant that when Bill C-43 was first proposed, Ged Baldwin, the MP who had fought longest and hardest for legislation of this kind originally gave the bill a B+ rating; his colleagues in the opposition admitted to being pleasantly surprised at the willingness of the Trudeau government to be so open.[73] Academics and interest groups, while not as overly enthusiastic, were willing to concede that the bill was a good beginning and, with amendments to make the exemptions less sweeping (the Canadian Bar Association had proposed some 44 amendments), had the makings of a very strong bill.[74] It is apparent, comparing Bill C-43 as introduced with the Act as passed, that more limitations were imposed including the broad exclusion of cabinet documents, making some exemptions mandatory where they were previously permissive (e.g., information provided in confidence by provincial governments), all of which resulted in a much more restrictive statute. In the end, legislators who had laboured to get such a statute on the books could not in good conscience support the bill that resulted, or were reduced to supporting the bill because it was "better than nothing" and because of the promise of parliamentary review.

The verdict that the legislation is a "new Official Secrets Act in disguise" may be too harsh[75] but the limitations in the Act strongly suggest that an individual in Canada has access only to information the government wants him to have.

Footnotes

1. Quoted in Murray Rankin, Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, 1977), p. 1.

2. "Bureaucracy", in H.H. Gerth and C. Wright Mills (eds. and Trans.) From Max Weber: Essays in Sociology (New York: Oxford Univ. Press, 1958), p. 233.

3. See Donald Rowat, Administrative Secrecy in Developed Countries (New York: Columbia Univ. Press, 1979); D. Rowat, "A Comparative Perspective on the Right of Access," in The Right to Know: Essays on Governmental Publicity and Public Access to Information (Ottawa: Carleton Univ. Dept. of Pol. Sci., 1981), p. 115.

4. Ibid. See also S. Anderson, "Public Access to Government Files in Sweden," Am. Journ. of Comp. Law, 21:3, Summer, 1973.

5. Rowat, "A Comparative Perspective on the Right of Access," op. cit., p. 116.

6. Canada Gazette"Access to Information Act"(Schedule I), 29-30-31 Eliz. II, 1982

7. Donald Rowat, "How Much Administrative Secrecy?", Can. Journ. of Econ.and Pol. Sci., 31:4, Nov., 1965, p. 481.

8. G. Bruce Doern, "Canada," in I. Galnoor (ed.), Government Secrecy in Democracies (New York: New York Univ. Press, 1977), p. 223.
see also D. Rowat, Administrative Secrecy in Developed Countries, op. cit., ch. 11.

9. D. Rowat, "How Much Administrative Secrecy?", op. cit., pp. 482-83.

10. See Donald Smiley, "Freedom of Information: Rationales and Proposals for Reform," in John D. McCamus (ed.), Freedom of Information: Canadian Perspectives (Toronto: Butterworth, 19810, pp. 12-13. See also K. Kernaghan, "Freedom of Information and Ministerial Responsibility," research publication of Ontario Commission on Freedom of Information and Individual Privacy (Toronto, 1979).

11. Cited in D. Rowat, "How Much Administrative Secrecy," op. cit., p. 480.

12. See Stanley Cohen, "Freedom of Information and the Official Secrets Act," in J.D. McCamus, op. cit., pp. 152-66.

13. See Donald Rowat, "Canada's Security Classification System", in J.D. McCamus, op. cit., pp. 167-74.

14. In R. v. Toronto Sun (1979), 24 O.R. (2d)621.

15. Stanley Cohen, op. cit. See also Tim Naumetz, "Official Secrets and the Treu case," in D. Rowat, The Right to Know, op. cit., pp. 215-34.

16. Canada, Report of the Task Force on Government Information Services, Ottawa: 1969; Canada, Royal Commission on Security, Ottawa, 1969.

17. D. Rowat, "Canada's Security Classification System and Freedom of Information," op. cit., p. 169.

18. Ibid., p. 172.

19. Donald V. Smiley, "The Two-Party System and One-Party Dominance in the Liberal Democratic State," Can. Journ. Econ. Pol. Sci., 24:3, August, 1958; John T. McLeod, "Explanations of Our Party System," in Paul Fox (ed.), Politics: Canada, 5th ed. (Toronto: McGraw-Hill Ryerson, 1982), 310-21.

20. Ibid., p. 313.

21. Erwin Hargrove, "Popular Leadership in Anglo-American Democracies," quoted in R. Van Loon and M. Whittington, The Canadian Political System, 3rd ed. (Toronto: McGraw-Hill Ryerson, 1981), p. 101.

22. See Seymour Martin Lipset, "Revolution and Counterrevolution: The United States and Canada," in O.M. Kruhlak, R. Schultz, and S.I. Pobihushchy (eds.), The Canadian Political Process: A Reader (Toronto: Holt, Rinehart and Winston of Canada, 1973), pp. 1-29.

23. See R. Presthus, Elite Accommodation in Canadian Politics (Toronto: Macmillan, 1973).

24. It is difficult to mention Ged Baldwin's work in a single sentence because his work in the area of freedom of information in Canada has spanned close to 20 years. When a comprehensive history of the evolution of freedom of information legislation in Canada is written, Baldwin's work will no doubt be more fully recognized.

25. Canada, Report of the Task Force on Government Information Services, op. cit., p. 9.

26. See Paul G. Thomas, "Secrecy and Publicity in Canadian Government," Can. Public Admin., 19:1, Spring, 1976, p. 159.

27. D.F.Wall, The Provision of Government Information (Ottawa: Privy Council Office, 1974), p. 48.

28. Ibid.

29. Mentioned in P.G. Thomas, op. cit., p. 158.

30. Special Committee on Freedom of Information, Freedom of Information in Canada : A Model Bill (Ottawa: Canadian Bar Association, 1979)

31. Bill C-15, House of Commons, introduced Oct. 24, 1979.

32. Canada Gazette, "Privacy Act" (Schedule II), 29-30-31 Eliz. II, 1982.

33. See Heather Mitchell, "Freedom of Information and Official Secrets," Canadian Forum, February, 1981, p. 18.

34. For discussion of the application of the Official Secrets Act in this case, see House of Commons Debates 3881-83 (1978).

35. Toronto Globe and Mail, Mar. 8, 1979, p. 4.

36. Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Report), Ottawa, 1979. See also Toronto Globe and Mail, Nov. 14, 1977, for summary of the Royal Commission on the Confidentiality of Health Records (Krever Commission) findings on RCMP investigative activities.

37. The latitude with which the RCMP operated tended in the mid to late '70s to be more extreme than their American counterparts, according to the Globe and Mail. Comparative statistics presented by the paper led it to conclude that "on a per capita basis, Canadian police are ten times more likely to use wiretaps in criminal investigations than their counterparts in the U.S." Globe and Mail, April 18, 1979.

38. These included groups such as Access (a Canadian Committee for the Right to Public Information), a citizens' lobby group; the Canadian Bar Association; the Civil Liberties Association; and, to a more limited extent, the Canadian Association for University Teachers, the Canadian Daily Newspapers Association, and the Public Interest Advocacy Center.

39. See, for example, Canada, Minutes, Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, April 2, 1981 (witness: Consumers' Association of Canada), 25A:4.

40. Toronto Star, June 19, 1976.

41. Canada, House of Commons Debates 6715, Jan. 29, 1981.

42. See discussion in Canadian Bar Association's Model Bill, op. cit., pp. 12-14.

43. P.G. Thomas, p. 158. See also B.L. Smith and D.C. Hague (eds.), The Dilemma of Accountability in Modern Government (New York: St. Martin's Press, 1971).

44. Toronto Globe and Mail, March 2, 1983. Inger Hansen, lawyer and formerly Canada's Privacy Commissioner, was appointed to the post.

45. Access to Information, Sec. 4.2.

46. Ibid., Sec. 5.1 - 5.4.

47. Ibid., Sec. 7 - Sec. 10.

48. Ibid., Sec. 11.1 - 11.6.

49. Ibid., Sec. 41.

50. Frank Underhill observed in 1955: "By some instinctive subconscious mental process the Canadian people have apparently decided that since freedom depends upon a balance of power, they will balance the monopolistic power of the Liberal government in Ottawa by setting up the effective countervailing power not in Ottawa but in the provincial capitals." In "Canadian Liberal Democracy in 1955," from Press and Party in Canada, G.V. Ferguson and Frank Underhill (eds.), Toronto: Ryerson, 1955, pp. 39-40.

Such factors as single-party dominance, regionalism and the lack of representation of these interests on the national level have all served to enhance this situation even more, making federal-provincial negotiations the arena where policies are debated, national consensus sought, regional interests articulated and represented. See Garth Stevenson, Unfulfilled Union (Toronto: Gage Publishing, 1982), pp. 174-97; and Richard Simeon, Federal-Provincial Diplomacy (Toronto: Univ. of Toronto Press, 1972).

51. Canada, House of Commons Debates, 6714, Jan. 29, 1981. See also Toronto Globe and Mail, Mar. 4, 1981, p. 8.

52. Ibid.

53. Canada, House of Commons Debates, 18856, June 28, 1982.

54. Ibid., 18854-57.

55. Canada, Minutes, Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs (March 19, 1981); witness: Canadian Bar Association. See also Minutes, Dec. 13, 1979; witness: Donald Rowat.

56. Ibid.

57. Toronto Globe and Mail, April 6, 1981, p. 4.

58. Douglas Wood, "The American Freedom of Information Act," in J. McCamus, op. cit., p. 197.

59. Special Committee on Freedom of Information (CBA) Model Bill, p. 35.

60. Canada, Report of the Tast Force on Government Information Services, p. 11.

61. The Canadian Bar's Model Bill contains no provision for this area of exemption. Critics who argued for inclusion under cabinet documents when Bill C-43 was first proposed included Donald Rowat, The Right to Know, op. cit., p. 544; J. McCamus, "Bill C-43: The Federal Canadian Proposals of 1980", in McCamus, op. cit., pp. 284-85.

62. Canada, House of Commons Debates, 6693-4, Jan. 29, 1981; 18860, June 28, 1982.

63. M.Q. Connelly, "Freedom of Information and Commercial Confidentiality," in McCamus, op. cit., p. 102.

64. Canada, House of Commons Debates, 18859, June 28, 1982.

65. As Francis Fox observed, in attempting to justify the government's move: "...The position in our common law is still not quite clear on the court's obligation to protect confidences. In the circumstances, the government thought it wiser to maintain absolute privilege in this regard and to simply withdraw such documents from the scope of the legislation." Ibid., 18854.

66. Ibid., 18875-76.

67. This according to Walter Baker, describing the Minister's reaction during the Justice Committee deliberations, Debates, 18857, June 28, 1982.

68. Heather Mitchell, op. cit., p. 19.

69. See Rowat, "Access to Information Not Strong Enough," in Rowat, The Right to Know, op. cit., p. 534. Rowat's comments were, of course, directed at Bill C-43 as first proposed. However, since these areas were retained in the final version, his comments are still applicable.

70. John Watkins, "The Freedom of Information Act and Special Treatment for the Press", in D. Anderson, ed., Privacy and Public Disclosure Under the Freedom of Information Act (Austin: Univ. of Texas Law School, 1976), p. 130.

71. See J. McCamus, "Bill C-43", in McCamus, op. cit., p. 269.

72. Ibid.

73. Canada, House of Commons Debates, 18859, June 28, 1982.

74. See Rowat, "Access to Information Not Strong Enough"; McCamus, "Bill C-43," in McCamus, op. cit.; Catherine Crerar, "A Critique of Bill C-43", in Rowat, The Right to Know, op. cit., 503-31.

75. Vancouver Sun, March 23, 1981; Calgary Herald, June 29, 1982, A7.